

Exhibit USAbt-U

Olympia, WA

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL INDUSTRY) MDL No. 1456
AVERAGE WHOLESALE PRICE) Civil Action No.
LITIGATION) 01-12257-PBS

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THIS DOCUMENT RELATES TO:) Hon. Patti B.
United States of America ex rel.) Saris
Ven-A-Care of the Florida Keys,)
Inc. v. Abbott Laboratories, Inc.,) Chief Magistrate
Civil Action No. 06-11337-PBS;) Judge Marianne
United States of America ex rel.) B. Bowler
Ven-A-Care of the Florida Keys,)
Inc. v. Dey, Inc., et al., Civil) DEPOSITION OF
Action No. 05-11084-PBS; and) WA DEPT. OF
United States of America ex rel.) SOCIAL AND HEALTH
Ven-A-Care of the Florida Keys,) SERVICES by AYUNI
Inc. v. Boehringer Ingelheim) HAUTEA-WIMPEE
Corp., et al., Civil Action No.)
07-10248-PBS) NOVEMBER 24, 2008

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Olympia, WA

Page 69

1 A. Yes.

2 Q. And is that a source that Washington
3 Medicaid looked to in developing its drug program
4 or the reimbursement for its drug program?

5 A. It is something that we heed,
6 definitely.

7 Q. That you heed?

8 A. (Nodding head up and down).

9 Q. Yes, okay. I'm going to hand you what
10 we'll mark as Exhibit No. 5.

11 (Exhibit Hautea-Wimpee 005 marked
12 for identification)

13 And for the record this is U.S. v.
14 Abbott, WA-00001224 through 1235. And it's a
15 Federal Register dated Friday, July 31st, 1987.

16 Are you familiar with 42 CFR, Section
17 447, 301 through 333?

18 A. I believe so. I don't remember the
19 exact numbers on the CFR that we use but, yes,
20 that -- that sounds about right.

21 Q. Okay. And if you look at the second
22 page of the exhibit which is the Bates No. 1225.

Olympia, WA

Page 70

1 A. Um hum.

2 Q. Do you see where it says at the top
3 Healthcare Financing Administration, Medicare and
4 Medicaid Programs; Limits on Payments for Drugs?

5 A. Yes.

6 Q. And then the Action: Final rule?

7 A. Yes.

8 Q. And then under the effective date it
9 says the regulations are effective October 29th,
10 1987. Do you see that?

11 A. Yes.

12 Q. Okay. Now, if you could turn to the
13 page, it's the second page from the back, and the
14 last four Bates numbers are 1234.

15 A. (Witness complies).

16 Q. And at the bottom where it says Subpart
17 D - Payment Methods for Other Institutional and
18 Noninstitutional Services; do you see that?

19 A. Subpart D?

20 Q. It's the middle column near the bottom.

21 A. Yes, um hum.

22 Q. Okay. And then the next column over

Olympia, WA

Page 71

1 where it provides a definition for estimated
2 acquisition cost; do you see that?

3 A. Yes.

4 Q. Now, Estimated Acquisition Cost is one
5 of the components of Washington Medicaid's
6 reimbursement for drugs; is that correct?

7 A. Yes.

8 Q. And if you could read that definition
9 and let me know if that's consistent with how
10 Washington interprets or defines Estimated
11 Acquisition Cost?

12 A. "Estimated Acquisition Cost" means the
13 agency's best estimate of the price generally and
14 currently paid by providers for a drug marketed
15 or sold by a particular manufacturer or labeler
16 in the package size of drug most frequently
17 purchased by providers. Yes, that is how we
18 understand it.

19 Q. Okay. And that's consistent with how
20 Washington Medicaid applies estimated acquisition
21 costs in its reimbursement methodology?

22 A. Yes.

Olympia, WA

Page 127

1 this date, you know, this is the current price,
2 that would be the -- the one on top, and then the
3 previous ones would be listed underneath and it
4 would show from what date to what date it was --
5 that price was effective.

6 Q. And so my question is in that listing,
7 the pricing listing for that NDC, if there are
8 old AWP's listed but for the current time period,
9 the date on which that reimbursement claim was
10 being processed there was no AWP listed, would
11 the -- and --

12 A. It would use whatever was the prior
13 segment because, again, it would not change
14 anything unless there's a termination date for
15 that segment and -- and something else, you know,
16 overrode it.

17 Q. Okay. Now, going back to our
18 discussion of the dispensing fees, were the
19 dispensing fees determined separate and apart
20 from the drug ingredient cost?

21 A. Yes.

22 Q. I'm going to hand you what we'll mark

Olympia, WA

Page 128

1 as Exhibit No. 12 -- excuse me, number 13.

2 (Exhibit Hautea-Wimpee 013 marked
3 for identification)

4 For the record it has a Bates range of
5 HHC006-428 through 429, and it is a State
6 Medicaid Agency Regional Bulletin, No. 94-25,
7 from the Healthcare Financing Administration to
8 all Medicaid State Agencies, dated September 6,
9 1994.

10 During the course of your duties in the
11 Rate Section, did you from time to time receive
12 State Medicaid Agency Bulletins?

13 A. Yes.

14 Q. And you received those from -- from
15 HCFA?

16 A. Yes.

17 Q. And did you understand that these State
18 Medicaid Agency Regional Bulletins provided
19 Washington State Medicaid's program updates about
20 federal regulations or policies relating to the
21 Medicaid program?

22 A. Yes.

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Olympia, WA

Page 129

1 Q. If you could look to the second page
2 which is ending in Bates No. 0429, towards the
3 bottom of the page. Do you see the sentence that
4 begins: We would like to clarify HCFA policy
5 that a dispensing fee determination must be
6 separate and distinct from the EAC determination
7 and unrelated to the cost of the drug product.
8 Do you see that?

9 A. Yes.

10 Q. Was that consistent with Washington
11 Medicaid's understanding of the dispensing fee
12 determination?

13 A. Yes.

14 MR. REALE: Objection; foundation.

15 MS. FORD: And you -- during your time
16 with MAA you were -- were you involved in
17 determining the dispensing fee for the Washington
18 Medicaid program?

19 MR. REALE: Objection; form.

20 THE WITNESS: Yes.

21 MS. FORD: And is it your testimony
22 that the State of Washington determined the

Olympia, WA

Page 130

1 dispensing fee separate and distinct from the
2 Estimated Acquisition Cost?

3 THE WITNESS: Yes.

4 MR. REALE: Objection; form.

5 MS. RAMSEY: Objection.

6 MS. FORD: And did Washington State
7 Medicaid determine the fee separate and apart
8 from the ingredient cost?

9 MS. RAMSEY: Objection.

10 MR. REALE: Objection to form.

11 MS. MANGIARDI: Objection.

12 MS. FORD: What's the basis of the
13 objection?

14 MR. REALE: Her prior testimony wasn't
15 that Washington Medicaid set the dispensing fee,
16 for one.

17 MS. FORD: I disagree with you, but the
18 record will speak for itself.

19 BY MS. FORD:

20 Q. Ayuni, did the Rate Section have
21 involvement with setting the dispensing fee for
22 the Washington Medicaid drug program?

Olympia, WA

Page 131

1 A. Yes, we updated the dispensing fees.
2 They were set previously, but like I said, most
3 of the dispensing fees that we gave were based on
4 Legislative vendor rate increases.

5 Q. And do you know how the dispensing fee
6 was originally determined?

7 A. No.

8 Q. Do you understand that the dispensing
9 fee was determined by the Washington Medicaid
10 program?

11 MR. REALE: Objection; leading.

12 THE WITNESS: There was a dis -- there
13 was a two- tiered dispensing fee system in place
14 when I came to the program in '79. And as I
15 said, all we did basically from that point on was
16 update those rates with the approved vendor rate
17 increases.

18 BY MS. FORD:

19 Q. And during your time with MAA, between
20 1991 -- let's just start -- I know you were with
21 the program -- well, actually, you -- you joined
22 MAA in 1979; is that correct?

Olympia, WA

Page 132

1 A. Yes.

2 Q. And are you still employed by MAA?

3 A. Yes.

4 Q. And during the time that you've been
5 employed by MAA, have you seen any documentation
6 that indicates that the dispensing fee is set by
7 anyone other than Washington Medicaid?

8 A. No.

9 Q. For example, have you seen any
10 correspondence or regulations or legislation
11 indicating that the Centers for Medicare and
12 Medicaid Services sets the dispensing fee for
13 Washington Medicaid?

14 A. No.

15 Q. And who do you understand to be the
16 entity responsible for setting the dispensing
17 fee?

18 A. The Rates Unit sets the dispensing fee,
19 or I should say updates the dispensing fee,
20 depending on the circumstances or, you know,
21 whenever the Legislature authorizes a vendor rate
22 increase.

Olympia, WA

Page 133

1 Q. Was the dispensing fee intended to
2 reimburse pharmacists the cost for dispensing the
3 drug?

4 A. Yes, it's supposed to reimburse them
5 for their administrative costs.

6 Q. Was the dispensing fee intended to
7 provide pharmacists a profit?

8 A. Profit was not part of the equation.

9 Q. Did Washington Medicaid have a practice
10 or policy of paying an inflated drug ingredient
11 cost to make up for a dispensing fee?

12 A. No.

13 MR. REALE: Objection to form.

14 MS. RAMSEY: Objection.

15 BY MS. FORD:

16 Q. Going back to the State Medicaid
17 program's determination of the Estimated
18 Acquisition Cost, I believe you testified that
19 from '91 to 2002 Estimated Acquisition Cost was
20 determined to be AWP minus 11%; is that correct?

21 A. Yes.

22 Q. And then in 2003 it changed to AWP

Olympia, WA

Page 139

1 Q. If you could turn to Exhibit No. 15,
2 which is the United States' Complaint against the
3 Roxane Defendants.

4 A. (Witness complies).

5 Q. If you could turn to the last page
6 which is part of Exhibit B. Actually, the
7 second-to-the-last page. Do you see the -- going
8 down the left-hand column to the seventh drug
9 listed there, Furosemide, 20 milligrams, with an
10 NDC of 00054429731. Do you see that listing?

11 A. 29731?

12 Q. Yes. It should be the seventh from the
13 top on the second-to-the-last page.

14 A. Oh, second-to-the-last page. All
15 right. Yes.

16 Q. And going across, do you see where the
17 -- the AWP reported by First DataBank is \$139.90?

18 A. Yes.

19 Q. And the price available to pharmacy
20 customers is \$9.82?

21 MR. REALE: Objection to form.

22 THE WITNESS: Yes.

Olympia, WA

Page 140

1 MS. FORD: Do you see that listed on
2 the schedule here? And the spread --

3 MR. REALE: Objection to form.

4 BY MS. FORD:

5 Q. The spread is \$130.08. Do you see
6 that?

7 A. Yes.

8 Q. Or a spread of 1325%?

9 A. Yes.

10 Q. First of all, have you heard the term
11 the spread before?

12 A. I don't remember.

13 Q. Okay. If I referenced the spread as
14 the difference between the AWP and the price paid
15 by a pharmacy, will you understand what I mean?

16 A. Yes.

17 Q. Okay. Would Washington Medicaid have
18 expected manufacturers such as Roxane to report
19 the Average Wholesale Price of \$139.90 when it
20 was actually -- the price of that drug available
21 to pharmacies was \$9.82?

22 MR. REALE: Objection to form,

Olympia, WA

Page 141

1 foundation.

2 MS. MANGIARDI: Objection.

3 THE WITNESS: That would have been
4 surprising.

5 BY MS. FORD:

6 Q. And we talked a few minutes ago about
7 how -- and effective July 1st, 2002 Washington
8 Medicaid reduced or changed its formula for
9 Estimated Acquisition Cost to be AWP minus 14%;
10 is that correct?

11 A. Yes.

12 Q. And I believe you testified that that
13 was because that was Washington Medicaid's
14 estimate of the acquisition cost of that drug to
15 pharmacies in Washington State; is that correct?

16 A. Yes.

17 Q. If you could look at Exhibit No. 16
18 now, the United States' Complaint against Dey,
19 and this time turn to the last page.

20 A. (Witness complies).

21 Q. I believe it's -- if you could look at
22 the sixth item down which is Albuterol Sulfate

Olympia, WA

Page 142

1 0.083%, 3-milliliter 25s; do you see that?

2 A. Yes.

3 Q. And going across, do you see where the
4 AWP listed by First DataBank was \$30.25?

5 A. Yes.

6 Q. And then the price to the pharmacy
7 customer of \$4.10?

8 A. Yes.

9 Q. And the spread of \$26.15?

10 A. Yes.

11 Q. And then the percentage of spread being
12 a 638% spread between what a pharmacy would pay
13 for the drug and what the AWP for that drug was?

14 MR. REALE: Objection to form.

15 THE WITNESS: Yes.

16 BY MS. FORD:

17 Q. Would that exceed what Washington
18 Medicaid would assume manufacturers would report
19 as an AWP?

20 A. Yes.

21 MR. REALE: Could you please read the
22 last question or the last answer back, please,

Olympia, WA

Page 143

1 the whole Q&A?

2 (The Reporter read back the
3 portion contained on lines 22-24 of page 108)

4 Q. And if Defendant Abbott Laboratories
5 similarly reported AWP's that were in excess of a
6 500% spread, would that exceed what Washington
7 Medicaid believed manufacturers should report as
8 an Average Wholesale Price for those drugs?

9 A. Yes.

10 MS. RAMSEY: Objection.

11 MS. FORD: Has Washington Medicaid ever
12 approved of manufacturers reporting falsely
13 inflated A -- Average Wholesale Prices to pricing
14 compendia?

15 MR. REALE: Objection.

16 MS. MANGIARDI: Objection.

17 MS. RAMSEY: Objection.

18 THE WITNESS: No.

19 BY MS. FORD:

20 Q. To your knowledge did any of those drug
21 companies, Abbott, the Dey Defendants, or the
22 Roxane Defendants, ever ask Washington whether

Olympia, WA

Page 144

1 its conduct was permissible?

2 A. No.

3 MS. RAMSEY: Objection.

4 MS. FORD: Did Washington Medicaid ever
5 approve of the AWP's that we've seen in Exhibits
6 15 and 16?

7 MR. REALE: Objection.

8 MS. RAMSEY: Objection.

9 MS. MANGIARDI: Objection.

10 THE WITNESS: Not knowingly, no.

11 BY MS. FORD:

12 Q. I'll hand you what we'll mark as
13 Exhibit No. 17.

14 (Exhibit Hautea-Wimpee 017 marked
15 for identification)

16 And for the record, this is an exhibit
17 to the United States expert re -- one of the
18 United States' expert reports --

19 MR. REALE: Which one?

20 MS. FORD: -- relating to Abbott.

21 MR. REALE: Which one?

22 MS. FORD: Dr. Dugan's report.

Olympia, WA

Page 147

1 you can -- you can obtain it then. I think that
2 would be a more efficient use of everyone's time.

3 MS. RAMSEY: Whatever you prefer.

4 BY MS. FORD:

5 Q. I'll hand you what we'll mark as
6 Exhibit No. 18.

7 (Exhibit Hautea-Wimpee 018 marked
8 for identification)

9 For the record this is DL-TX-0090851
10 and it's titled Dey Laboratories, Inc.,
11 Memorandum to Pam Harris from Robert Mozak, dated
12 February 24th, 1992.

13 Ayuni, this document was produced to
14 the United States in its -- in the course of
15 discovery with the Dey Defendant and it is a
16 Pricing Strategy Memorandum used by Dey
17 Laboratories. If you could turn to the second
18 page of the exhibit.

19 A. (Witness complies).

20 Q. You see under the subheading
21 Objectives, and then the third objective down is:
22 To provide incentive to retail/chain providers to

Olympia, WA

Page 148

1 use Dey's Albuterol UD by increasing the spread
2 on Medicare/Medicaid reimbursements?

3 A. Yes.

4 Q. Did Washington Medicaid approve of
5 manufacturers purposely setting their AWP's high
6 so that providers, including pharmacists, could
7 benefit from the spread between the acquisition
8 cost and Washington Medicaid's reimbursement for
9 a product such as Albuterol?

10 MR. REALE: Objection.

11 MS. MANGIARDI: Objection.

12 THE WITNESS: No.

13 MS. COATS: Is that marked as Exhibit
14 No. 18?

15 BY MS. FORD:

16 Q. Yes, it is. I'm going to hand you what
17 we'll mark now as Exhibit No. 19.

18 (Exhibit Hautea-Wimpee 019 marked
19 for identification)

20 For the record, this has a Bates label
21 of DL-TX-0091591 and also DEY057-0686. And it is
22 a January 2nd, 2001, Notice of Price Change to

Olympia, WA

Page 155

1 information -- all of the answers you've provided
2 have been accurate?

3 A. Yes.

4 Q. Very good. Before we begin --

5 MR. REALE: There's like some feedback
6 going on with the microphone. Sorry.

7 (Discussion held off the record)

8 BY MS. FORD:

9 Q. Prior to taking a break we were looking
10 at some of the United States' Complaints against
11 drug manufacturers. Do you recall that?

12 A. Yes.

13 Q. And with respect to Exhibits 15 and 16,
14 we looked at attachments to those Complaints that
15 were appended to the Complaint, and now I'm going
16 to show you what I've marked as Exhibit 20 --
17 excuse me, what will be marked as Exhibit No. 20.

18 (Exhibit Hautea-Wimpee 020 marked
19 for identification)

20 And this is Exhibit 1 to the United
21 States' Complaint against Abbott Laboratories.

22 MS. RAMSEY: Becky, if you could give

Olympia, WA

Page 156

1 me just a moment to pull up that document.

2 MS. FORD: Just let me know when you're
3 ready.

4 MS. RAMSEY: Okay. You're referencing
5 the First Amended Complaint?

6 MS. FORD: Correct.

7 MS. RAMSEY: Okay. I'm ready.

8 BY MS. FORD:

9 Q. Do you have that exhibit in front of
10 you?

11 A. Twenty?

12 Q. Yes.

13 A. Yes.

14 Q. Very good. Okay. And if you could
15 look at the fifth drug on this list, Dex --
16 excuse me, Dextrose Solution, 5%, 79; do you see
17 that?

18 A. Yes.

19 Q. With an NDC of 00074792202?

20 A. Yes.

21 Q. And during the 2001 time period the AWP
22 listed for this drug by First DataBank was

Olympia, WA

Page 157

1 \$283.20. Do you see that?

2 A. Yes.

3 Q. And then the price available to at
4 least some pharmacists was \$25.56. Do you see
5 that?

6 A. Yes.

7 MR. REALE: Objection.

8 BY MS. FORD:

9 Q. And the estimated dollar value of the
10 spread was \$257.69, with a spread percentage of
11 over 1000%. Do you see that?

12 A. I see that.

13 Q. And would Washington Medicaid have
14 expected manufacturers to provide information to
15 pricing compendia that would reflect that large
16 of a spread between the price available to
17 providers and the price, the AWP price?

18 A. No.

19 MS. RAMSEY: Objection.

20 BY MS. FORD:

21 Q. Prior to learning of the lawsuits which
22 we're taking your deposition in today, did

Olympia, WA

Page 158

1 Washington become aware -- Washington Medicaid
2 become aware of differences between the Average
3 Wholesale Price and the price at which providers
4 in Washington State were actually paying for
5 drugs?

6 A. I can't speak for other people, but
7 certainly we have heard about -- about the, you
8 know, allegations that there were price
9 discrepancies or that there was this inflation or
10 artificial inflation of prices.

11 Q. And did you or did Washington State
12 have any understanding of the -- the amount of
13 that inflation?

14 A. No.

15 Q. Did Washington Medicaid intend for
16 providers to be able to make a profit between the
17 difference on reimbursement for a drug and what
18 they were actually paying for a drug?

19 A. I can't say that we intended to. We
20 certainly I would think rec -- recognized that
21 there's usually a profit factor in what some
22 people, you know, what providers and suppliers in

Olympia, WA

Page 159

1 general charge consumers for that. I would
2 expect that we would have -- our understanding
3 would have been that it would be reasonable.

4 Q. Would Washington Medicaid have expected
5 some providers to be making millions of dollars
6 based upon the spread between the acquisition
7 cost of a drug and the reimbursement for that
8 drug?

9 A. No.

10 MR. REALE: Objection.

11 MS. MANGIARDI: Objection.

12 MS. RAMSEY: Objection.

13 MS. FORD: Would you consider that type
14 of conduct an abuse of the Medicaid system?

15 MR. REALE: Objection.

16 THE WITNESS: Yes.

17 MS. MANGIARDI: Objection.

18 MS. RAMSEY: Objection.

19 MS. FORD: Did Washington Medicaid know
20 that the AWP prices in the drug file provided to
21 it by First DataBank for some manufacturers had
22 no basis in market prices?

Olympia, WA

Page 160

1 MS. MANGIARDI: Objection.

2 MS. RAMSEY: Objection.

3 MR. REALE: Objection.

4 THE WITNESS: I can't say that we had
5 knowledge of that. We may have suspected
6 something, but no.

7 MS. FORD: And would Washington
8 Medicaid have had any way of knowing which
9 manufacturers were reporting accurate prices and
10 which manufacturers were not?

11 THE WITNESS: No.

12 MR. REALE: Objection.

13 MS. RAMSEY: Objection.

14 MS. MANGIARDI: Objection.

15 MS. FORD: Did Washington Medicaid know
16 that some drug manufacturers intentionally set
17 high AWP's to create a financial incentive for
18 pharmacists to purchase their drugs?

19 MS. RAMSEY: Objection.

20 MR. REALE: Objection.

21 MS. MANGIARDI: Objection.

22 THE WITNESS: No.

Olympia, WA

Page 161

1 MS. FORD: Did Washington Medicaid know
2 that some drug manufacturers marketed the spread
3 on their drugs as an inducement for pharmacists
4 to purchase that manufacturer's drug over another
5 manufacturer's drug?

6 MS. MANGIARDI: Objection.

7 MS. RAMSEY: Objection.

8 THE WITNESS: We would have had
9 suspicions, but we wouldn't know for sure, no.

10 BY MS. FORD:

11 Q. Did Washington Medicaid approve of that
12 conduct?

13 A. No.

14 Q. I'm going to take a quick break to
15 change the tape.

16 THE VIDEOGRAPHER: This is the end of
17 tape number three of the deposition of Ayuni
18 Hautea-Wimpee. The time is now 1:15 p.m. We are
19 off the record.

20 (Short break taken)

21 THE VIDEOGRAPHER: This is the
22 beginning of tape number four of the deposition